JUN 5 1975

MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

No. 74-1528

Botany Industries, Inc.

and

Michael Daroff,

Petitioners,

v.

The First National Bank of Boston

and

Max Robb, Trustee in Bankruptcy
of Botany Industries, Inc.

and

Statutory Creditors Committee of
Botany Industries, Inc.,

Respondents.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ISAIAH W. CRIPPINS,
*Attorney for Petitioners.*

PRESS OF ALLEN, LANE & SCOTT, INC., PHILADELPHIA

IN THE

# Supreme Court of the United States

*Botany Industries, Inc., Bankrupt*
*and*
*Michael Daroff*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

### PETITION

The petitioners, Botany Industries, Inc. and Michael Daroff respectfully pray that a writ of certiorari issue to review the order of The United States Court of Appeals for the Third Circuit affirming the order of the United States Court of the Eastern District of Pennsylvania.

### OPINIONS BELOW

The Judgment Order was entered by the United States Court of Appeals for the Third Circuit on February 13, 1975, in fact, less than three hours after argument on the merits had been heard. A timely petition for a rehearing was filed and was denied March 6, 1975. No opinion was issued or filed by the United States Court of Appeals for the Third Circuit for either its judgment order of February 13, 1975 or its denial of the motion for rehearing on March 6, 1975. No opinion was issued by the District Court upon its order of December 2, 1974 by Judge John Morgan Davis.

### JURISDICTION

This is a bankruptcy proceeding and jurisdiction is invoked under 28 USC Section 1254.

## QUESTIONS PRESENTED

1. Whether or not there is any such *rari avis* as a motion of summary affirmance by a United States Court of Appeals of a Judgment Order of a lower court.

2. Can an agent or sub-agent of a trustee in bankruptcy validly buy an asset of the bankrupt corporation administered by the agent or sub-agent of the trustee?

## STATEMENT OF THE CASE

Glenoit Mills, Inc. is a wholly owned subsidiary of Botany Industries, Inc., the bankrupt. In order to obtain operating capital, Botany Industries, Inc., had pledged the stock of Glenoit Mills, Inc. to The First National Bank of Boston. For many years Clarence Hafford had been an executive officer of Botany Industries, Inc. and the president of Glenoit Mills, Inc. Immediately prior to the bankruptcy of Botany Industries, Inc. Clarence Hafford resigned as an executive officer of Botany Industries, Inc. but remained the president of Glenoit Mills, Inc., the wholly owned subsidiary of Botany Industries, Inc. During the entire bankruptcy proceedings he has remained the chief executive officer of Glenoit Mills, Inc. He has continued in such capacity even until this day. The trustee decided to sell Glenoit Mills, Inc. He sold it to Clarence Hafford. This gives rise to Question #2 of the questions presented—Can an agent or sub-agent of a trustee in bankruptcy validly buy an asset of the bankrupt corporation administered by the agent or sub-agent of the trustee? Two Circuits have answered negatively to this question. The Second, The United States Court of Appeals for the Second Circuit in the case of Wolverton *v.* Shell Oil Company, 1971, 422 Fed 2nd, Second Series, 666. The Ninth Circuit answered the question negatively. Donovan and Schuenke *v.* Paul W. Sampsell, 226 Fed 2nd, Second Series, 804, cer den 350 US 895, 76 Supreme Court 425,

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100 Lawyers' Ed 787. Only the United States Court of Appeals for the Third Circuit has answered the question affirmatively. Thus, only the United States Court of Appeals for the Third Circuit has stated that an agent of the trustee may purchase property that is an asset of the bankrupt. This would seem to vitiate Section 29 of the Bankruptcy Act 18 USCA 1 Section 154 which reads as follows: "Whoever, being a Referee, Receiver, Trustee, Custodian, Marshall, or other officer of the Court, knowingly purchases, directly or indirectly, property of the Estate of which he is such an officer in a bankruptcy proceeding . . . shall be fined not more than $500 and shall forfeit his office which thereupon shall become vacant". The United States Court of Appeals for the Third Circuit made no attempt to distinguish the decisions of the Second Circuit or the Ninth Circuit. The United States Court of Appeals for the Third Circuit would seem to have ignored the admonition of the Sampsell case which says at page 811 "even if there is full disclosure, adequacy of consideration, absence or secret profit, an open judicial sale will not avail separately or in combination as a defense for such a fiduciary period. The prohibition is absolutely in the public interest. *It is established to protect the courts themselves from the suspicion of chicanery*". (Emphasis supplied).

## CONCLUSION

For these reasons a writ of certiorari should issue to review the Judgment Order and the illegal procedure used in this case by the United States Court of Appeals for the Third Circuit.

Respectfully,

ISAIAH W. CRIPPINS
Counsel for Botany Industries, Inc.;
Counsel for Michael Daroff, Petitioners

I hereby certify on this 6th day of June, 1975, three copies of Petition for Writ of Certiorari were served to Adelman & Lavine, Attys-at-Law, 2 Penn Center Plaza, Suite 1900, Philadelphia, Pa. 19102, Counsel for Max Robb, trustee; and David Sykes, Esq., of Duane, Morris and Heckscher, 100 S. Broad St., Phila., Pa. 19110, Counsel for The First National Bank of Boston; and mailed certified return receipt requested to Hahn, Hessen, Margolis & Ryan, Counsel, 350 Fifth Ave., N. Y., N. Y. 10001, for Clarence Hafford

ISAIAH W. CRIPPINS
Counsel for Botany Industries, Inc.;
Counsel for Michael Daroff, Petitioners

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## APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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No. 75-1032

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In Re: BOTANY INDUSTRIES, INC., Bankrupt,
Botany Industries, Inc., *Appellant*

(Bankruptcy Cause No. 72-273 E. D. Pa.)

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Present: SEITZ, *Chief Judge*, ALDISERT and GARTH, *Circuit Judges.*

ORDER

ORDERED that Appellant's motion for rehearing, which counsel advised the Clerk was to be sent to the panel only, is hereby denied.

By the Court,

COLLIN A. SEITZ
*Chief Judge*

DATED: March 6, 1975

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## APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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No. 75-1032

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In Re: BOTANY INDUSTRIES, INC., Bankrupt,
Botany Industries, Inc.,
Michael Daroff, *Appellants*

(Bankruptcy Cause No. 72-273, E. D. Pa.)

MOTION FOR REHEARING

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

COMES NOW, the appellants, Botany Industries, Inc. and Michael Daroff, and allege as follows:

1. The Motion for Summary Affirmance was served on Appellants on January 8, 1975. (See Affidavit of January 16, 1975 by Antonia Daniel, attached to Answer to Motion for Summary Affirmance.)

2. An Order signed by Judge Aldisert, speeding up the entire Appellate process was issued on January 10, 1975.

3. A Motion to Vacate or Modify this Order was filed by appellants on January 16, 1975. This Motion was denied by the Court.

4. An answer to the Motion for Summary Affirmance was filed January 16, 1975.

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5. Thus, it is apparent that when Judge Aldisert signed the Order to speed-up the Appellate process on January 10, 1975, he could not possibly have read the Answer to the Motion for Summary Affirmance.

6. When an Appellant Court, pursuant to Rule 26 of the Rules of Appellate Procedure, speeds up the judicial process, it must first determine as a matter of fact that an emergency exists or it has abused its discretion and deprived the Appellants of judicial due-process and equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States. This question was raised by the Appellants in their Motion to Vacate or Modify Order of January 10, 1975. Throughout the entire document, which was filed on January 16, 1975.

7. It was raised again in the Answer to Motion for Summary Affirmance beginning with the very first paragraph and continuing throughout the entire document.

8. Any careful perusal of the Answer to Motion for Summary Affirmance will show that a controversy existed between Mr. Sykes and Mr. Crippins as to whether or not any actual emergency existed or whether the emergency had been manufactured by Mr. Sykes, counsel for The First National Bank of Boston.

9. It is true that Appellate Courts do not take testimony except in the exercise of their original jurisdiction, but they can appoint Masters to take testimony for them. (See the case and Briefs in the case of United States *v.* Texas.)

10. No treatise or case in any U.S. Court upholds the procedure followed by the United States Court of Appeals for the Third Circuit in this case.

11. The above are sufficient reasons for a rehearing in this case. In addition, thereto, Judges Aldisert and Garth should have disqualified themselves from hearing

the Appeal on the Merits for they had erroneously found an emergency which did not exist and does not now exist, had received no factual information that was uncontroverted, therefore, they had, prior to the hearing on the Merits, deprived Appellants of procedural due process and equal protection of the laws guaranteed Appellants by the Fourteenth Amendment of the Constitution of the United States. These questions had been raised before this Court prior to the hearing of the Appeal on the Merits.

12. The writer of this Motion cannot believe that the Court carefully considered these points prior to the hearing on the Merits, for no mention was made by the Court at the hearing on the Merits and because the hearing on the Merits did not end until 1:00 P.M. on this Order and the Order affirming the Order of the lower Court was in the Clerk's office before 3:00 P.M.

13. On Page 2 of Exhibit "A" as filed in the Motion for Summary Affirmance, it can be seen "Hafford's obligations to the Bank shall not be terminated or affected if it is unable to obtain the financing necessary to pay the purchase price to the Trustee and First Boston unless, Hafford is excused from performance by reason of the concurrance or failure of fulfillment of any of the events specified in Paragraph 4 hereof". And, a close examination of Paragraph 4 will show that his offer is not contingent upon the financing of Bankers Trust. Mr. Clarence Hafford has been submitting offers since 1971 or before—each time at a lower offering price—and there is no reason why Clarence Hafford, Inc. cannot now defer closing until the Appellants have had an opportunity to present their case properly to the Court of Appeals and that Court has had a reasonable time to consider carefully the Merits of the Appeal. Glenoit Mills, Inc. has been, and continues to be, quite profitable. Hence, no loss would accrue to Clarence Hafford, Inc. for having waited.

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It is understandable why the First National Bank of Boston would want to pressure the Court to issue a Summary Affirmance and hence avoid a thorough exposure of the basic facts underlying the Appeal. It is much less obvious why the Trustee, his attorneys and the attorney for the Creditor's Committee would join that Bank in these pressure tactics. For after all, the Trustee, after continuous and long urging by the Directors and Officers of Botany Industries, Inc., filed a twenty-five million dollar law suit against the First National Bank of Boston claiming that the bank illegally forced the bankruptcy of Botany Industries, Inc. Moreover, this writer sincerely doubts whether that Bank still deserves the status of a secured creditor as a result of its interference and intrusion in top management decision-making at Botany Industries, Inc. for many months prior to the filing under Chapter XI proceedings.

It therefore does not seem proper that the Court should be stampeded into a Summary Affirmance by the very bank that the Trustee and his counsel contend caused the bankruptcy in the first place."

14. Even if this Court refuses this Motion for Rehearing, the Appellants pray the Court to answer the following in it's Opinion, as well as give answers to the above.

I have already communicated with the office of Justice Brennan of the Supreme Court of the United States, but there is not to much that I can do until I see the Opinion of the Court of Appeals for the Third Circuit. Therefore, I would ask that as soon as possible, in view of the speeded-up process, that the Court issue such an Opinion.

The Court mentions that costs are assessed against the Appellant; since I represent two appellants, I should like to know how I am to allocate these costs? If the Court is allowing only one Appeal, I would like to know

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why only one is included, and also some statement as to why not the other? Since the decision by your Court today flies in the teeth of the written Opinion of two other Circuits, I should like to know what distinctions if any, are being made, and for future guidance, why, and under what circumstances are such distinctions made? Specific answers to these questions would greatly aid me in my discussions with Justice Brennan's clerk, which are due to be heard tomorrow in Washington, D. C.

15. By getting the Courts eyes and minds focused on a manufactured emergency, the Court was misled by Counsel for the First National Bank of Boston and missed the gravamen of the real question in this case: *i.e.* Is Clarence Hafford an agent or sub-agent of the Trustee? If not, what is he? How could he be in possession of Glenoit Mills, Inc. and operate Glenoit Mills, Inc. if he is not an agent or sub-agent of the Trustee? He was a Director of Botany Industries, Inc. and a member of Botany Industries, Inc.'s Executive Committee. In light of all these things, which were mentioned in Appellants' Brief and flatly denied by the First National Bank of Boston, nevertheless, neither the First National Bank of Boston nor the U.S. Court of Appeals for the Third Circuit has answered the question of what is Mr. Hafford? Is he a trespasser? Or is he just a vicious interloper? The real question in this case is, how can a valid sale be made to Clarence Hafford or Hafford Inc., should not the lower Court have pierced the Corporate veil?

16. Since the Courts of Appeals of two Circuits have ruled against such a sale, why should the United States Court of Appeals for the Third Circuit ride off in a different direction.

17. For the reasons stated above, Appellants pray the United States Court of Appeals for the Third Circuit to reverse its Order of February 13, 1975 and grant Ap-

pellants the necessary relief prayed for in this Motion. And they shall forever pray.

Isaiah W. Crippins, Esquire
Counsel for Botany Industries, Inc.
Counsel for Michael Daroff,
Creditor of Botany Industries, Inc.

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Re: BOTANY INDUSTRIES, INC., Bankrupt

CERTIFICATE OF SERVICE

I, Isaiah W. Crippins, being duly authorized by Botany Industries, Inc. and by Michael Daroff, Creditor of Botany Industries, Inc., do hereby certify that I served on February 18, 1975, the Motion for Rehearing as follows:

1. David T. Sykes, 16th floor, 100 S. Broad St., Philadelphia, Penna., by directly to the person in charge of Mr. Sykes' office.

2. Sidney Chait, 1900 Two Penn Center Plaza, Philadelphia, Penna., by directly to the person in charge of Mr. Chait's office.

3. Stuart H. Savett, 1214 IVB Building, Philadelphia, Penna., by directly to the person in charge of Mr. Chait's office.

4. Lawrence King, 299 Park Avenue, New York, New York, on J.J.L. Hessen, 3700 Empire State Building, Fifth Avenue and 34th Street, New York, New York, by Registered Mail, Return Receipt Requested.

ISAIAH W. CRIPPINS, ESQ.
Counsel for Botany Industries, Inc.
Counsel for Michael Daroff,
Creditor of Botany Industries, Inc.

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 75-1032

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In Re: BOTANY INDUSTRIES, INC., Bankrupt,
Botany Industries, Inc., *Appellant*
(Bankruptcy Cause No. 72-273, E. D. Pa.)

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Argued February 13, 1975

Before SEITZ, *Chief Judge*, ALDISERT and GARTH, *Circuit Judges*

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JUDGMENT ORDER

Upon consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the order of the district court be and is hereby affirmed.

Costs taxed against appellant.

The certified judgment-order in lieu of formal mandate shall issue forthwith.

By the Court,

SEITZ
*Chief Judge*

Attest:

THOMAS F. QUINN
*Clerk*

DATED: February 13, 1975

## APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

C. A. Misc. Record No. 75-8002

No. 75-1032

In Re: BOTANY INDUSTRIES, INC., Bankrupt,
Botany Industries, Inc., Bankrupt,
*Appellant*

(D. C. No. B-72-273 In Bankruptcy)

Pursuant to the order of this Court, entered this date in the above-entitled case, the appellant is directed to deposit with the Clerk of this Court the requisite docketing fee of $50.00 for the docketing of this appeal not later than January 13, 1975; and

It is FURTHER ORDERED that briefs for the appellant and the appellees are to be hand filed and hand served in legible typewritten form, original and six copies, not later than January 20, 1975, with leave granted to each side to hand file and hand serve reply briefs in the form outlined above not later than January 24, 1975; and

It is FURTHER ORDERED that this case be listed for disposition on the merits during the week of February 10, 1975.

For the Court,

*Clerk*

DATED: January 10, 1975

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## APPENDIX E

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BOTANY INDUSTRIES, INC. IN BANKRUPTCY
BANKRUPT

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No. 72-273

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ORDER

AND NOW, this second (2nd) day of December 1974, upon consideration of the Record on Appeal, and oral argument by appellant and counsel for appellees heard on November 27, 1974, it is hereby

ORDERED AND DECREED that the Appeal of Michael Daroff from the Order of Bankruptcy Judge Emil F. Goldhaber dated October 7, 1974, approving the sale of the stock of Glenoit Mills, Inc., to Clarence Hafford, Inc., for the total consideration of $6,737,500 be, and it is hereby, dismissed, with prejudice.

By the Court

JOHN MORGAN DAVIS
*J.*

ED